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THE POWER OF ONE PARTNER TO BIND THE FIRM BY SEALED INSTRUMENT.

That one partner cannot bind his copartners by any instrument under seal, is a general rule firmly established, and we believe not questioned by any decision, either in England or America. The leading case is *Harrison* v. *Jackson*, 7 Term Rep., 207, decided by the Court of King's Bench, in 1797. In delivering the opinion of the court, Lord KENYON, C. J., said: "The power of binding each other by deed, is now, for the first time insisted on. * * * Then it was said, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners."

The same point had already been decided in Pennsylvania, thirteen years earlier, in *Gerard* v. *Basse et al.*, 1 Dallas, 119.

In that case, one partner had executed a bond and warrant to confess judgment, to which there was one seal, and the signature "John A. Soyer, for Basse & Soyer." Judgment was entered on the bond against both partners, and the court held it good only as to the one signing, and gave the plaintiff leave to strike out the name of the other. In delivering the opinion of the court, SHIPPEN, President, said: "there can be no doubt that in the course of trade, the act of one partner is the act of both. There is virtual authority for that purpose, mutually given by entering into partnership, and in everything that relates to their usual dealings, each must be considered as the attorney of the other. But this principle cannot be extended further to embrace objects out of the course of trade. *It does not authorize one to execute a deed for the other;* this does not result from their connection as partners; and there is not a single instance in the books which can countenance such an implication."

The principle thus laid down in these two cases has been very rigidly adhered to in England, but in the United States there has always been more or less disposition to limit its generality, and though, as a general rule, it has not been shaken yet several important exceptions may now be considered as firmly established in most of the states. Thus in *Hart* v. *Withers*, 1 Penn. Rep., 285, though the Supreme Court of Pennsylvania decided that the other partners were not bound by the deed, notwithstanding it had been given in a transaction in the course of business of the firm, and the benefit had been received by them, yet HUSTON, J., dissented, and stated his reasons so briefly and pointedly, that they are well worth reproducing in his own language. "The grounds on which one partner is not permitted to bind the other by deed, in England, do not exist, or at least, all of them do not exist here. They are: 1st. That the consideration of a deed cannot be inquired into—here it can. 2d. That a bond will bind the lands of any partner who has lands, after his death—here a common note, nay, account, is recovered after the death of the debtor, out of land. It is admitted, even there, that one partner may bind another by bond, sealed in his presence, although with but one seal.

This must be solely because his assent is clearly proved by his being present and agreeing, not dissenting; now I cannot see why assent clearly proved in one way is not as effectual as assent clearly proved in another. Here, the offer was to prove that each of the partners, who were iron masters and had lands in partnership, as well as chattels, were in the constant habit of making contracts under seal, which were ratified by the others, and the benefits enjoyed by them—that this contract, on the face of it for wood, was for wood for their iron works, and was actually used at them and the benefit enjoyed by them all. I would then have permitted this to go to the jury, and if they found a clear assent either before or after, I would hold them bound. One partner is often bound in equity, differently from what he is at law, because he has received the benefit: *Lang* v. *Keppele*, 1 Bin., 123. I would confine the power to partnership transactions, and to property which came into partnership, and was enjoyed by them under a contract which they knew was made by one of the firm."

Subsequent cases, not only in Pennsylvania but in most of the other states, have established the law in substantial conformity with the principles of Judge HUSTON'S opinion. The leading cases on this point, are *Gram* v. *Seton*, 1 Hall, 262, and *Cady* v. *Shepherd*, 11 Pickering, 400. In the former case, the Superior Court of New York City determined that one partner cannot make a sealed instrument, even though it be necessary in the usual course of business of the firm, unless authorized by the other partners, but authority need not be given expressly or under seal, but may be implied from the nature of the business or the conduct of the partners. The instrument sued on in that case was a charter party, but an elaborate opinion was given by JONES, C. J., covering the whole class of sealed instruments. In the other case, *Cady* v. *Shepherd*, the Supreme Court of Massachusetts held, that the instrument would be valid and bind the firm, if previously authorized or subsequently ratified by them, and that such authority or ratification may be by parol. It may now be taken as settled law in most of the states, that either previous authority to a partner or subsequent ratification, will make his deed valid to bind the firm,

and that such authority or ratification may be by parol: *Fichthorn* v. *Boyer*, 5 Watts, 159; *Bond* v. *Aitkin*, 6 W. & S., 165 (overruling *Hart* v. *Withers*, 1 Penn., 285, and adopting the reasoning of HUSTON, J., already quoted); *Mackay* v. *Bloodgood*, 9 Johns. 285; *Smith* v. *Kerr*, 3 Comst., 144; *Swan* v. *Stedman*, 4 Met. 548; *Pike* v. *Bacon*, 8 Shepl., 280; *Fleming* v. *Dunbar*, 2 Hill, S. C., 532; *Fant* v. *West*, 10 Rich. Law, 149; *Drumright* v. *Philpot*, 16 Ga., 424; *Grady* v. *Robinson*, 28 Ala., 289; *Gwin* v. *Rooker*, 24 Mo., 290; *Price* v. *Alexander*, 2 Greene, Iowa, 427; *Haynes* v. *Seachrest*, 13 Iowa, 455; *Henderson* v. *Barbee*, 6 Blackf., 26; *Day* v. *Lafferty*, 4 Pike, 450; *McDonald* v. *Eggleston*, 26 Vt., 154; *Remington* v. *Cummings*, 5 Wis., 138; *Wilson* v. *Hunter*, 14 Wis., 683; *Shirley* v. *Fearne*, 33 Mi., 653; *Fox* v. *Norton*, 9 Mich., 207; *Charman* v. *McLane*, 1 Or., 339; *Lowry* v. *Drew*, 18 Tex., 786.

In a few of the states, however, it would seem that the strict technical reasoning of the English cases has prevailed, and it is held that to make the deed good there must be express authority (or ratification) *under seal: Little* v. *Hazzard*, 5 Harrington, 291; *Turbeville* v. *Ryan*, 1 Humphreys, 113; *Napier* v. *Catron*, 2 Hump., 534. In Kentucky the question hardly seems settled. The early cases of *Trimble* v. *Coons*, 2 A. K. Mars, 375, and *Cummings* v. *Carsily*, 5 B. Mon., 74, held that the authority must be under seal, but the later case of *Ely* v. *Hair*, 16 B. Mon., 230, goes upon the ground that parol authority or ratification will be sufficient, but does not notice or expressly overrule the previous decisions.

Trimble v. *Coons*, *Peirson* v. *Carter*, 3 Murphy, 321, and a few other of the earlier American cases, appear to sanction the English rule (founded on the ancient decisions, that the same piece of wax might serve for the seals of several obligors), that if the deed was sealed by one in the *actual presence* of the other, it would bind both, thus making a most singular confusion of the authority itself, and the evidence by which it is proved, the foundation of an unsubstantial distinction effectually disposed of by a few words in the opinion of HUSTON, J., in *Hart* v. *Withers*, already quoted. This distinction is now, however, abandoned in most of the American cases. In *Modisett* v. *Lindley*, 2

Blackf., 119, it is expressly held that presence is merely evidence of consent, for there the partner, though present, not having knowledge of the act, was held not bound. But in *Gardner* v. *Gardner*, 5 Cush., 483, it is held that signing by one person (whether partner or not) for another *in his presence*, and by his express direction, is a good signing by the latter; the opinion of SHAW, C. J., though very brief, and apparently not much considered, appearing to sustain the soundness of the distinction between an act done in or out of the presence of the party sought to be charged. In *Lambden* v. *Sharp*, 9 Humphreys, 224, it was held that where there are more signatures than seals, the court will presume that several of the parties adopted the same seal, but this presumption may be rebutted by evidence, and it will then be a question for the jury, whether the instrument is sealed by all. And if the signature be in the firm name only, it will be presumed to be the several signature and seal of all the partners, but open to rebuttal by plea and evidence as in other cases. To the same effect are *Davis* v. *Burton*, 3 Scam., 41, and *Hatch* v. *Crawford*, 2 Porter (Ala.), 54.

In all the foregoing cases it is to be borne in mind that the instrument must be made in the firm name, and purport to be the act of the firm. For if the partner, though authorized to execute a deed in the partnership name, does in fact make it in his own name merely, it will bind himself only, and will moreover merge the firm debt, if the latter be on a simple contract, so as to discharge the other partners: *United States* v. *Ashley*, 3 Wash. C. C., 508. And the same effect will follow, according to the authority of some cases, if the partner signing the firm name is not authorized to do so. In such case the suit should be against the party signing as on his individual obligation: *Clement* v. *Brush*, 3 Johns. Cas., 180; *Button* v. *Hampson*, Wright (Ohio), 93; *Nunnely* v. *Doherty*, 1 Yerger, 26; *Waugh* v. *Carriger*, Id., 31; *Morris* v. *Jones*, 4 Harring., 428. And if the bond be declared on against both as a joint obligation, no recovery can be had even against the one who signed: *Lucas* v. *Sanders*, 1 McMullan, 311. In an action by a firm, however, on a sealed instrument, the defendant cannot plead that it was executed by one partner only, for the suit is a ratification by all who are joined in it: *Dodge* v. *McKay*, 4 Ala., 346.

The doctrine that a bond in the firm name by a partner not authorized to make it, merges a simple contract debt of the firm and substitutes the sealed obligation of the partner signing, has not, however, commanded universal assent. In *Doniphan* v. *Gill*, 1 B. Mon., 199, it was expressly rejected, the court holding that there could be no merger where it appeared on the face of the instrument that there was no such intention in the minds of the parties at the time of execution. To the same effect, apparently, are *Fronebarger* v. *Henry*, 6 Jones, Law, 548, and *Despatch Line* v. *Bellamy Man. Co.*, 12 N. H., 235.

All of the foregoing cases, moreover, assume that the transaction in which the bond is made is one arising in the due course of the partnership business. Otherwise the partner is on the same footing with any stranger, and to validate his act it must appear to have been expressly authorized under seal. Thus in *Ruffner* v. *McConnel*, 17 Ills., 212, it was held that one partner, even though expressly authorized by parol, cannot convey land or make a contract specifically enforcible against the others. See also *Bewly* v. *Innis*, 5 Harris, 485, and *Snyder* v. *May*, 7 Harris, 235. For the same reason bonds of submission to arbitration, and warrants to confess judgment, have been uniformly held invalid, unless authorized by sealed instrument; they are not in the regular course of business, and therefore not partnership transactions: *Karthaus* v. *Ferrer*, 1 Pet., 222; *Crane* v. *French*, 1 Wend., 311; *Armstrong* v. *Robinson*, 5 G. & J., 412; *Barlow* v. *Reno*, 1 Blackf., 252; *Sloo* v. *State Bank*, 1 Scam., 428; *Mills* v. *Dickson*, 1 Richards, 487. But if an award be made, and the money received by both, or by one in the firm name, the acceptance will be good either as a release or as accord and satisfaction: *Buchanan* v. *Curry*, 19 Johns, 137; *Lee* v. *Onstott*, 1 Pike, 206.

Having thus considered how one partner may bind his copartners by sealed instrument, *with their consent*, and how that consent may be proved, we come now to how he may bind them *without their consent*. And first, he may *release a debt* by sealed instrument. This is well settled both in England and the United States: *Bowen* v. *Marquand*, 17 Johns., 58; *Smith* v. *Stone*, 4 Gill & J., 310; *Morse* v. *Bellows*, 7 N. H., 549; and he may authorize an agent, under seal, to release: *Wells* v.

Evans, 20 Wend., 251; S. C., 22 Wend., 324. So he may sign a composition-deed with a debtor of the firm: *Beach* v. *Ollendorf*, 1 Hilton, 41. The reason that a release is good is stated by KENT, C. J., in *Pierson* v. *Hooker*, 3 Johns., 68, to be that the deed is good as to the partner signing, and a release by one of joint creditors is good as to all, citing *Ruddock's case*, 6 Co., 25. Perhaps an equally satisfactory reason is, that the rule itself which makes the deed of one partner in the partnership name bad, extends only to those cases in which the effect of the deed would be to charge the partners with a new liability.

A second class of cases, where a partner may bind his copartners under seal without their consent, express or implied, was marked out by Chief Justice MARSHALL at an early day. In *Anderson* v. *Tompkins*, 1 Brock, 456, he said: "The principle of *Harrison* v. *Jackson* is settled. But I cannot admit its application in a case where the property may be transferred by delivery under a parol contract. I cannot admit that a sale so consummated is annulled by the circumstance that it is attested by a deed." The principle thus enunciated has always been favorably regarded by the American courts, and it is now well settled in most of the states, that if the act done would have been valid without a seal, the addition of the seal does not vitiate it: *Tapley* v. *Butterfield*, 1 Met. (Mass.), 515; *Milton* v. *Mosher*, 7 Metc., 244; *Everitt* v. *Strong*, 5 Hill (N. Y.), 163; *Robinson* v. *Crowder*, 4 McCord, 537; *Dubois's Appeal*, 2 Wright (Penn.), 236; *Deckard* v. *Case*, 5 Watts, 22; *McCullough* v. *Summerville*, 8 Leigh, 415; *Forkner* v. *Stuart*, 6 Grattan, 197; *Lucas* v. *Bank of Darien*, 2 Stew., 280; *Human* v. *Cuniffe*, 32 Mo., 316. In Kentucky, however, and perhaps in the other states where the strict ruling of the English cases is followed, this exception is not allowed. Thus in *Montgomery* v. *Boone*, 2 B. Monr., 244, ROBERTSON, C. J., says: "The principle thus settled as to *deeds*, seems to have been recognized as applicable to all contracts under seal to pay money, even though a seal was not essential to the obligation of such contract. This may have been a perversion or extension of the principle as to *deeds* which was probably applicable at first only to such writings as would be ineffectual without a seal, and not to such as might be as binding and effectual without as with a

seal. All judicial question, however, has been concluded on this subject also by this Court."

In conclusion, we may regard the American decisions as now pretty well harmonized on the general principle, that a sealed instrument, executed by one partner only, in the firm name, is not valid to create a new liability on the part of the other partners, unless such liability is one which the partner could have created without seal, or unless his act was previously authorized or subsequently ratified by the other partners; and that such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties or the course of the business. J. M. L.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

PROVIDENCE INSTITUTION FOR SAVINGS *v.* CITY OF BOSTON.

The word "place," where the bank is located, used in the Acts of Congress, in reference to the taxation of national banks, means the *state* in which the bank is located.

The Act of Congress of Feb. 10, 1868, which prescribes that the taxation of the shares in national banks "shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens," is satisfied if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

Where the *rate* of taxation is the same for individual capital and shares of non-resident owners of national bank stock, the fact that the latter are taxed specifically, for the benefit of the state treasury, and the former for local municipal purposes, does not make the tax invalid, as in conflict with the Act of Congress.

Benjamin F. Thomas for the plaintiffs.

Charles Allen (Attorney-General) and *Clement Hugh Hill* for the defendants.

The opinion of the Court was delivered by

AMES, J.—By the terms of the Act of Congress of June 30, 1864, under which the national banks have come into existence, all the shares in each of said banks are made taxable in the place in which the bank is "located," without any regard whatever to the legal domicile of the shareholders respectively. This